No. 17,004

IN THE

United States Court of Appeals

For the Ninth Circuit

.LFONS SIMON KEIL,

Appellant,

VS.

'NITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

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IN THE

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For the Ninth Circuit

Alfons Simon Keil, *Appellant,* vs. United States of America, *Appellee.*	

BRIEF FOR APPELLEE

STATEMENT OF FACTS

Appellant, a native and national of Germany, was admitted to the United States on August 4, 1953. He registered for Selective Service at Local Board No. 52, Oakland, California, on February 4, 1954. His Selective Service Questionnaire was received by the Local Board on February 16, 1954. On February 17, 1954, the Local Board issued to him Form C-294. (Application by Alien for Exemption from Military Service.) This application was returned to the Local Board, fully completed and signed by the appellant on March 1, 1954; and as a consequence, appellant was classified IV-C by the Local Board as a treaty alien exempt from military service on March 3, 1954.

On March 18, 1959, appellant filed a petition for naturalization in the United States District Court at

San Francisco, California. He was afforded a hearing pursuant to Section 335(b) of the Immigration and Nationality Act (Title 8 U.S.C. §1446(b)) before a designated naturalization examiner on June 30, 1959. At that hearing the appellant and his wife stated that they could not recollect completing the application. They both testified that appellant neither spoke nor understood English at the time. The designated naturalization examiner found that appellant's claim of complete ignorance was unfounded and recommended that the petition for naturalization be denied.

At the final hearing on the petition held in the District Court on February 24, 1960, additional evidence was introduced concerning appellant's inability to speak and understand English during the approximate period when the application was submitted. The trial Court held that this evidence did not establish that appellant was lacking in understanding of his application for exemption. The petition was denied on March 30, 1960, by the United States District Court, and it is from this Order that the appellant appeals.

STATUTES INVOLVED

Immigration and Nationality Act, Section 315, Title 8 United States Code, Section 1426:

> "(a) Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or has

elieved or discharged from such training or serv-
e on such ground, shall be permanently ineligible
become a citizen of the United States.

(b) The records of the Selective Service System
r of the National Military Establishment shall
e conclusive as to whether an alien was relieved
r discharged from such liability for training or
ervice because he was an alien. June 27, 1952,
. 477, Title III, ch. 2 §315, 66 Stat. 242."

QUESTION PRESENTED

Hs the appellant established that he lacked *under-
staning* of his application for exemption from mili-
taryservice to the extent that it was not an "intelli-
gentelection" between exemption and citizenship?

ARGUMENT

In a naturalization proceeding, the burden of estab-
lishing eligibility for naturalization rests upon the
alie, and any doubts concerning his qualifications
mus be resolved against him and in favor of the
Unied States.

United States v. Schwimmer, 279 U.S. 644, 49 S.Ct. 448 (M29);

Petition of Reginelli, 119 A. 2d 454, 20 N.J. 266, *certiorari denied,* 351 U.S. 918, 76 S.Ct. 711, 100 L.Ed. 1450 (1956);

Taylor v. United States, 231 F. 2d 856 (C.A. 5, 1956);

Brukiewicz v. Savoretti, 211 F. 2d 541 (C.A. 5, 1954).

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses.

> *Rule 52(a), Federal Rules of Civil Procedure; Taylor v. United States,* supra.

Such findings of fact are presumptively correct and will not be set aside on appeal unless clearly against the weight of the evidence.

> *United States v. Gypsum Co.,* 333 U.S. 364, 395 (1948);
> *Paramount Pest Control v. Brewer,* 177 F. 2d 564, 567 (C.A. 9, 1949);
> *Lassiter v. Guy F. Atkinson Co.,* 176 F. 2d 984 (C.A. 9, 1949).

The burden is upon the appellant to show the findings to be wrong in a compelling fashion. Should the findings be based upon conflicting evidence, they will be presumed on appeal to be correct and in a manner most favorable to the prevailing litigant.

> *Grace Bros. v. Commissioner of Internal Revenue,* 173 F. 2d 170, 173 (C.A. 9, 1949);
> *Augustine v. Bowles,* 149 F. 2d 93, 96 (C.A. 9, 1945);
> *Wittmayer v. United States,* 118 F. 2d 808.

Appellant does not contend that he was misled by any "higher authority", as in *Moser v. United States,* 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729 (1951) cited in appellant's brief (p. 5), nor that he was misinformed by his draft board, as *In re Planas,* 52

F.Spp. 456 (1957). He seeks to avoid the consequences of his application by the claim of "lack of understanding." This claim is supported only by evidence that he "did not read English nor did he speak or understand it very well". (Appellant's brief, p. 7.)

Melanie Weise, a friend, testified that on December 31, 1953 appellant understood no English, but she also admitted that she did not speak English. There was no question that they both understood German. (T. 22.)

Eileen Croft, appellant's landlady for three or four years, testified that he spoke no English in March of 1954, but that his wife, Katharina, could speak and understand English well enough to rent the apartment. (T. 25.)

Max Drollet met the appellant late in 1954. He testified that appellant did not "fully comprehend" the English language (T. 29), but he also stated (T. 30) that appellant's "wife would come to the place most of the time and she would explain."

Alberta Drollet, who worked with appellant's wife, testified that she had met appellant's brother Willibal, and that his English was poor also (T. 33): "He might have spoken a little bit better than Mr. Keil."

Appellant's wife, Katharina, testified on direct examination that she had no recollection of completing the application for exemption for her husband, but admitted that her handwriting was thereon. (T. 36.) On cross-examination she testified concerning the more detailed Selective Service Questionnaire. (T. 40.) (Testimony of Mrs. Katharina Keil):

"Q. Now, this is his brother's, the questionnaire?

A. Well, he prints small, just the same as I do. I think some of it, like this, I recognize isn't mine.

Q. Here it says his brother helped him make it out.

A. Yes, we did; and we trusted him.

Mr. Lyons. I haven't anything more.

The Court. Let me ask you this: You say you didn't even remember that document?

The Witness. No, because there was several and we just——

The Court. So now when you answer Mr. Lyons and saying you could read some and couldn't read other portions, you are just assuming that's right, isn't that it? You have no recollection of what happened?

The Witness. No, we didn't know we filed like [28] that up until last July. We were shocked to see such a paper existing."

The testimony concerning the degree of understanding of appellant's brother, Willibald, indicates that he, also, was unable to "fully comprehend" the English language, *although he assisted in the completion of the more complex Selective Questionnaire.*

The District Court, in adopting the findings of fact and conclusions of law of the designated naturalization examiner, stated (T. 11-12):

". . . It need not, however, be concluded that because the petitioner did not understand English that he necessarily did not understand the exemption application at the time it was filled out even

nough such form was in English. Direct evidence s to the understanding of the petitioner at the me the exemption application form was com-leted is slight. Both petitioner and petitioner's ife testified that they did not remember having lled out the form or even having seen it before the earing upon the petitioner's citizenship applica-ion on June 30, 1959, even though the form was dmittedly in the handwriting of the petitioner's ife and bore the signature of the petitioner.

"The record indicates that the petitioner had he exemption form in his possession between six o nine days before it was returned to the draft oard. There is no evidence that the petitioner onsulted his brother Willibald, who had two days efore prepared and executed the longer, more etailed Selective Service Questionnaire; there is o evidence that the petitioner consulted the aunt who accompanied him to the draft board, or that he petitioner consulted the draft board or the German Consul concerning the form. The failure o consult with anyone other than his wife is of tself inconclusive on the question of the peti-ioner's understanding of the exemption applica-ion itself. However, the form itself correctly, ccurately and completely filled out, constitutes at east some evidence that the person who filled out he form understood the language appearing on ts face. Petitioner furnished correctly such in-formation as his local draft board number, alien registration number, nationality, and the country under whose treaty exemption was claimed. This form, signed by him, designated by the Depart-ment as C-294, contains upon its face a copy of Section 315 of the Immigration and Nationality

> Act of 1952, which informed the reader that one applying for exemption on the ground that he is an alien and is relieved from military service on such ground 'shall be permanently ineligible to become a citizen of the United States.' Upon the evidence presented the court finds that the petitioner did knowingly and intelligently waive his right to citizenship."

Claims of misunderstanding based on an inability to read and write English are not uncommon in this type of case and have been generally rejected by the Courts.

Petition of Coronado, 132 F. Supp. 419 (1955), *affirmed per curiam,* 224 F. 2d 556;
Memishoglu v. Sahli, (C.A. 6) 258 F. 2d 50 (1958).

Appellant does not claim any lack of understanding of the contents of the exemption form other than might be drawn as an inference from his inability to read or speak English.

The facts are clear: Appellant registered for Selective Service on February 4, 1954; received his questionnaire and completed and returned it to the Local Board on February 16, 1954. On February 17, 1954 the Local Board mailed to him Form C-294, the request for exemption. This form was received by him, carefully completed and returned to the Local Board on March 1, 1954. On March 3, 1954, he was classified IV-C. He was notified of his classification, and he accepted it without protest or objection.

Apellant made a bargain with the United States. He gve up his right to become a citizen in return for xention from military service. As stated by the Supme Court:

> The neutral alien in this country during the war as at liberty to refuse to bear arms to help us in the struggle, but the price he paid for his unillingness was permanent debarment from nited States citizenship."

Ceballos v. Shaughnessy, 352 U.S. 599, 77 S.Ct. 545, 1 L.Ed. 2d 583 (1957).

CONCLUSION

It s respectfully submitted that the District Court lid ot err in finding the appellant permanently inligile to become a citizen of the United States, and herupon denying appellant's petition for naturalization, The findings of the District Court were not "clerly erroneous", and the judgment of the District Cou should be affirmed.

Dted, March 15, 1961.

Respectfully submitted,

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